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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Susana E. Verduzco,
10 Plaintiff,

11 v.

12 Kimberly A. Mulligan, et al.,
13 Defendants.
14

No. CV-19-04745-PHX-DWL
ORDER

15 Plaintiff Susana E. Verduzco (“Plaintiff”), who is self-represented, has filed a
16 motion for a subpoena. (Doc. 15.) For the following reasons, the motion will be denied
17 without prejudice.

18 **BACKGROUND**

19 On May 22, 2019, Plaintiff initiated this lawsuit by filing a complaint in the
20 Maricopa County Superior Court. (Doc. 1-3 at 20-52.) In a nutshell, the complaint asserts
21 a medical malpractice claim against one defendant, Kimberly A. Mulligan, M.D.
22 (“Mulligan”). (*Id.*)

23 On July 17, 2019, the United States removed this action to federal court on the
24 ground that “it is an action against a United States Department of Veterans Affairs
25 employee who was acting within the course and scope of her employment at or around the
26 time of the incident in question.” (Doc. 1.) The following day, the United States filed a
27 notice of substitution—thereby substituting itself for Mulligan as the defendant—because
28 “[t]he sole cause of action of negligence within Plaintiff’s Complaint is a state law cause

1 of action sounding in tort,” the Federal Tort Claims Act (“FTCA”) “provides that a suit
2 against the United States shall be the exclusive remedy for persons with claims for damages
3 resulting from the negligent or wrongful acts or omissions of federal employees taken
4 within the scope of their office or employment,” and the United States Attorney’s Office
5 has certified that, at the time of the conduct alleged in the Complaint, Mulligan “was acting
6 within the scope of her federal employment as an employee of the United States
7 Department of Veterans Affairs.” (Doc. 5.)

8 On July 24, 2019, the United States filed a motion to dismiss due to Plaintiff’s
9 failure to exhaust administrative remedies. (Doc. 11.) The motion asserts that Plaintiff did
10 not submit an administrative claim to the Department of Veterans Affairs (“VA”) until
11 May 21, 2019, and that the VA still has not ruled upon that claim. (*Id.* at 3.) The motion
12 further asserts that, under *D.L. v. Vassilev*, 858 F.3d 1242 (9th Cir. 2017), a plaintiff will
13 not be deemed to have exhausted her administrative remedies—which is a jurisdictional
14 prerequisite to filing an FTCA claim—until “the relevant agency finally denies it in
15 writing, or if the agency fails to make a final disposition of the claim within six months of
16 the claim’s filing.” (*Id.* at 3.) Enclosed as an exhibit to the motion is a copy of Plaintiff’s
17 administrative claim form, which is a “Standard Form 95” that was signed by Plaintiff on
18 May 20, 2019 and marked “RECEIVED” by the Phoenix VA office on May 21, 2019.
19 (Doc. 11-1.)

20 ANALYSIS

21 In her “Motion for Subpoena,” Plaintiff explains that she wishes to submit a
22 subpoena to the “Phoenix VA Health Care System’s Integrated Ethics Program Manager”
23 so she can obtain a copy of “Defendant’s privileging file.” (Doc. 15 at 2.) She contends
24 this file will help her overcome the United States’ failure-to-exhaust argument because it
25 will reveal that she filed an ethics/malpractice complaint against Mulligan more than six
26 months ago: “[S]ix months has already elapsed as the ethics committee was notified of and
27 received initial complaint of malpractice six months ago.” (*Id.*) In a related filing, Plaintiff
28 elaborates that she filed an ethics complaint against Mulligan on or before February 2019

1 with the Phoenix VA's "Ethics Committee." (Doc. 16 at 2-3.) The related filing also states
2 that the ethics complaint included a "request for compensation," but it does not elaborate
3 on the precise nature of that request. (*Id.* at 3.)

4 Plaintiff's request for a subpoena is governed by General Order 18-19, which
5 provides that "any self-represented litigant who wishes to serve a subpoena must file a
6 motion with the Court for issuance of the subpoena" and that the motion must, among other
7 things, "state with particularity the reasons for seeking the testimony and documents."
8 General Order 18-19 further provides that "[t]he assigned judge shall determine whether
9 the requested subpoena shall issue."

10 The Court concludes that Plaintiff has not demonstrated a valid basis for seeking the
11 subpoena in question. Plaintiff's motion seems to be predicated on the notion that the filing
12 of any sort of complaint with the VA—such as an ethics complaint—will trigger the six-
13 month clock for exhaustion under the FTCA.

14 This is inaccurate. The FTCA provides that an action shall not be instituted against
15 the United States "unless the claimant shall have first presented the *claim* to the appropriate
16 Federal agency and his *claim* shall have been finally denied by the agency in writing and
17 sent by certified or registered mail." 28 U.S.C. § 2675(a) (emphases added). The Ninth
18 Circuit has further explained that, to qualify as a "claim," a submission to an agency must
19 contain both "(1) a written statement sufficiently describing the injury to enable the agency
20 to begin its own investigation, and (2) a sum certain damages claim." *Warren v. U.S. Dep't*
21 *of Interior Bureau of Land Management*, 724 F.2d 776, 780 (9th Cir. 1984) (en banc).¹

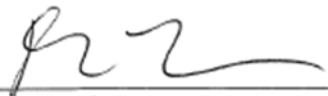
23 ¹ See also 28 C.F.R. § 14.2(a) ("[A] claim shall be deemed to have been presented
24 when a Federal agency receives from a claimant, his duly authorized agent or legal
25 representative, *an executed Standard Form 95 or other written notification of an incident,*
26 *accompanied by a claim for money damages in a sum certain* for injury to or loss of
27 property, personal injury, or death alleged to have occurred by reason of the incident; and
28 the title or legal capacity of the person signing, and is accompanied by evidence of his
authority to present a claim on behalf of the claimant as agent, executor, administrator,
parent, guardian, or other representative.") (emphasis added); *Blair v. I.R.S.*, 304 F.3d 861,
865 (9th Cir. 2002) (clarifying that although "the settlement regulations [that] are found at
28 C.F.R. §§ 14.1–14.11" are "not a jurisdictional requirement" and are merely "instructive
as to the presentation of a claim," "there is a jurisdictional requirement of a 'sum certain'
that comes from 28 U.S.C. § 2675").

1 Here, Plaintiff has not alleged that the ethics complaint she submitted to the VA
2 more than six months ago included a “sum certain damages claim.” If the complaint didn’t
3 include such a request, it will be meaningless for exhaustion purposes. Under these
4 circumstances, the Court will not authorize the issuance of a subpoena to obtain a medical
5 ethics committee’s file that contains sensitive and potentially privileged information.

6 Plaintiff may, however, resubmit a new subpoena request if she has a good-faith
7 basis for asserting that her ethics complaint included a “sum certain damages claim”
8 (which, to be clear, is different from an open-ended or vague demand for compensation).
9 But any future motion should be limited to a request for a copy of the ethics complaint
10 itself. Plaintiff has not explained why she needs the ethics committee’s entire file to mount
11 a defense to the failure-to-exhaust claim.

12 Accordingly, **IT IS ORDERED** that Plaintiff’s motion for subpoena (Doc. 15) is
13 **denied without prejudice.**

14 Dated this 2nd day of August, 2019.

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19 Dominic W. Lanza
20 United States District Judge
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